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No. 85-1610

In The

Supreme Court of the United States

October Term, 1985

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Appellant,

v.

CITIZENS ACTION COALITION OF INDIANA, INC., et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OF APPELLEES CITIZENS ACTION COALITION OF INDIANA INC. IN OPPOSITION TO JURISDICTION

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QUESTIONS PRESENTED

Does the U.S. Supreme Court have jurisdiction on an appeal from a state court decision on utility ratemaking, where no federal question was considered or decided?

Does a state violate the Due Process Clause or the Taking Clause of the Fourteenth Amendment when it limits payment of cash utility rates to payments for utility service and for the property used to provide that service?

RULE 28.1 LISTING

Appellee CITIZENS ACTION COALITION OF INDIANA, INC. has no publicly owned parent, affiliates or subsidiaries.

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JURISDICTION

Appellee CITIZENS ACTION COALITION OF INDIANA, INC. (hereinafter "CAC") respectfully submits that the Court lacks jurisdiction of the appeal in this case under 28 U.S.C. § 1257(2), because the case does not present a substantial federal question. Alternatively, the Court should refuse *certiorari* pursuant to 28 U.S.C. § 1257 (3) for prudential reasons related to the proper relations between state and federal responsibilities in the utility regulation field. In either case, the Court should dismiss this appeal and terminate this litigation.

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STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

1. Statement of the Case

On August 26, 1981, the Board of Directors of Appellant Northern Indiana Public Service Company (hereinafter "NIPSCO") terminated efforts to construct a nuclear fuel generating facility, Bailly Unit N-1, on the shores of Lake Michigan.

As NIPSCO told prospective investors immediately after the cancellation:

> On August 26, 1981, the company terminated the construction of Bailly N-1, a planned 644,000 kilowatt unit that would have used nuclear fuel. The latest year in which operation of Bailly N-1 would have been economically feasible was 1989. During August 1981, *the company concluded that Nuclear Regulatory Commission (NRC) resolution of the issues necessary to*

> *achieve a 1989 in-service date would not be forthcoming on a timely basis* and concluded that the 1989 in-service date had become unachievable. . . .

R.1521, NIPSCO Security Prospectus dated September 30, 1981, emphasis supplied.

This decision by NIPSCO's management led to their subsequent decision to attempt to charge NIPSCO ratepayers some two hundred twenty million dollars ($220,000,000) for the hole in the ground that was Bailly N-1. Hence this litigation.

The matters described below are distilled primarily from the securities prospectuses that NIPSCO issued during the eight years that NIPSCO had an active NRC construction permit for Bailly N-1.[1] (R. 1089-1167 and 1385-1536; Citizens Action Coalition Exhibits D-1 through D-26.)

In 1970, NIPSCO applied to the Atomic Energy Commission (AEC), the predecessor agency to the NRC, for a permit to construct a nuclear fuel generating facility on a sand dune on the shore of Lake Michigan. The site selected was immediately adjacent to the Indiana Dunes National Lakeshore. As subsequent events demonstrated,

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(1) The somewhat extended factual presentation is necessitated by misleading assertions in NIPSCO's Jurisdictional Statement (hereinafter "J.S.".) An example is the assertion that "Faced with the prospect that further spending on the project would be disallowed as 'imprudent' by the PSC, NIPSCO cancelled the project." (J.S., at 4.) There is not a shred of evidence to support this statement, or from which an inference about the directors' thinking about possible disallowances could be drawn. Of course, there is no finding to this effect by the Public Service Commission of Indiana or by any of the reviewing courts. Further examples will be noted as relevant.

this entailed undertaking substantial litigation risk. NIPSCO had not applied for or received any certificate of convenience and necessity from the Public Service Commission of Indiana.

On May 3, 1974, the AEC granted NIPSCO a construction permit. Five months later, (October 18, 1974), the Seventh Circuit Court of Appeals temporarily enjoined construction, on the ground that the AEC had violated its own regulations in siting the plant too near a dense population area. The injunction was made permanent in April 1975. *Porter County Chapter of Izaak Walton League v. Atomic Energy Commission,* 515 F. 2d 513 (7th Cir. 1975). Subsequent to this order, the AEC adopted different siting regulations, which caused this Court to vacate the permanent injunction, and remand for further proceedings. *Atomic Energy Commission v. Porter County Chapter of Izaak Walton League,* 423 U.S. 12 (1975). On remand, the Seventh Circuit approved the construction permit, in April 1976. *Porter County Chapter of Izaak Walton League v. Atomic Energy Commission,* 533 F. 2d 1011 (7th Cir. 1976). After this Court sustained the order of the Seventh Circuit in November 1976, construction commenced.

However, work progressed for only about nine months. On September 28, 1977, the Nuclear Regulatory Commission ordered NIPSCO to cease further construction activities pending a review of the impact of construction on the National Lakeshore. NIPSCO never resumed construction after September 28, 1977.[2]

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(2) This litigation summary highlights the fact that the key interactions between Appellant and government involved the

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As NIPSCO told its prospective investors a year later, in 1978:

> On September 28, 1977, pile driving activities were suspended at the request of the NRC until groundwater monitoring wells were installed and a NRC review completed. On October 3, 1977, the NRC staff

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federal Nuclear Regulatory Commission, not any organs of state government. The PSCI specifically so found.

> . . . ultimately the delays resulting from regulatory indecision on the federal level and the changing economics forced the cancellation of Bailly, N-1 in August 1981.)

Appendix 60a.

(Compare J.S. at 15: " . . . . Although the state did not physically seize Bailly, or specifically order it cancelled, it left NIPSCO no choice but to abandon the project once it had become clear that the project could not economically be brought to completion. . . .") The obstacles to NIPSCO's "doing things with its property" (see J.S. at 14) were primarily safety related questions within the jurisdiction of the NRC. However, the Takings Clause implications of the NRC's conduct were never explored in this case. Nor were the intricate interrelationships between state and federal authority in the nuclear power field explored. See, *Pacific Gas & Electric Co. v. California Energy Commission*, 461 U.S. 190, 103 S. Ct. 1713, 75 L.Ed.2d 752 (1983):

> " . . . [F]rom the passage of the Atomic Energy Act in 1954 through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear powered electricity generation: the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like."

103 S.Ct. 1713, 1726.

Appellee CAC (Appellant below in the Court of Appeals and the Supreme Court) argued in both the Indiana Court of Appeals and the Indiana Supreme Court that federal law allo-

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advised that resumption of pile driving was also contingent upon a favorable safety review of the proposed pile placement method. On October 28, 1977, the company received a copy of a petition addressed to the NRC by joint intervenors requesting 1) the company not resume pile placement or operate a well point dewatering system; 2) a Supplement Environmental Impact Statement be filed with respect to jetting of piles and monitoring; and 3) an evidentiary hearing be held on the questions of pile placement and monitoring. All required additional groundwater monitoring wells have been installed; however, pile driving activities are still suspended except for a limited indicator

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cates the risk of loss due to failure to satisfy NRC licensing criteria to utility investors, relying on *Power Reactor Development Corp. v. International Union*, 367 U.S. 396 (1962.) ("The petitioners concede that the [Atomic Energy Commission] is absolutely denied any authority to consider [the developer's] investment when acting on an application for a license for operation [of a nuclear powerplant.] PRDC has been on notice long since that it proceeds with construction at its own risk, and that all its funds may go for naught. With its eyes open, PRDC has willingly accepted that risk, however great." 367 U.S. 396, 414, quoted in Appellant's Brief, pp. 33-34.)) Neither court addressed the question, which implicates federal statutes.

The record in this case is not appropriate for consideration of a federal constitutional issue under the Takings Clause, at least in part because it is not clear which level of government, state or federal, effected the "take," if there was one. The Court ought not address the constitutional question on this record because there has been no exploration of the inter-relationship between state and federal responsibilities under the federal *statutory* scheme for handling nuclear power issues. The case was not litigated this way below, and there is no way to do this on the instant record. *Compare*, J.S. footnote 16 and related text, in which a creative but utterly unsupported contention about "inverse condemnation" is presented, without a single animadversion to the record or the pervasive federal role apparent therein.

> pile driving program while the NRC reviews the company's proposed pile driving method.

R. 1428-29; Prospectus dated October 3, 1978.[3]

Investors were aware of the difficulties experienced by the company with the Bailly N-1 construction project, because NIPSCO disclosed them, as it was bound to do by the federal securities laws. Every security prospectus issued by NIPSCO during the period 1974 through 1981 was introduced into evidence. (CAC Exhibits D-1 through D-26; R. 1067-1136; 1385-1536.) These Exhibits demonstrate that for a substantial period of time, NIPSCO's management was uncertain as to the effect of litigation and delay on their ability to complete the project, and on the economic viability of the project as delay at the federal level continued. Management fully disclosed the contingent nature of the speculative investment in Bailly N-1. Typical is the following:

> If an event or events occur which would prevent construction or operation of Bailly Unit N-1, it is uncertain, at this time, just what part of the company's total expenditures would be recoverable and what the extent and timing of the resulting adverse impact on the company would be.

R. 1398; see also, R. 1409; R. 1418; R. 1429; R. 1438; R. 1444; R. 1455; R. 1479.

During this period, investors bid down the price of NIPSCO's common stock, as one would expect. Compare R. 1160 (NIPSCO common stock price $18.50 per share on Feb. 23, 1977) with R. 1533 (NIPSCO common stock price

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(3) Compare the statement in J.S. at page 3: "Each of the challenges mounted against Bailly was decided in NIPSCO's favor, . . ." See also, Appendix, 62a-63a.

$11.25 on Dec. 4, 1981.) NIPSCO's expert witness so testified, on cross-examination:

> Q. We have talked about a number of factors that investors look at in deciding what sort of a return they will require on a common stock and presumably what price they will pay for that stock. Do investors using the sophisticated analyses you referred to earlier look at whether particular assets have been impaired in the capital structure of the company whose stock they are considering buying?
>
> A. For example, like the abandonment of the Bailly plant?
>
> Q. Well, for example, the possibility the Bailly plant might be abandoned.
>
> A. Yes, they do.

R. 2334-35.[4]

At the time of cancellation, the investment in Bailly N-1 had bought a large water-filled hole in the sand. (R. 890-92) NIPSCO had spent $122 million out of pocket.[5]

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(4) Compare the statement in J.S. at 16-17, fn. 15: " . . . Although NIPSCO's stock declined in value throughout the 1970's, the decline mirrored industry trends and could not be ascribed to Bailly's difficulties."

(5) The total investment at the time of cancellation was $205 million, of which $122 million was out of pocket. (R. 2061) After net salvage, primarily for sale of nuclear fuel and processing rights, the net loss to NIPSCO was $190 million. The difference between the two numbers is Allowance for Funds Used During Construction (AFUDC), an accounting entry representing the cost of money used for construction. It is capitalized and added to the "cost" of construction, and is included in the annual income statement as non-cash or "other" income. Under Indiana law, this is made up of both "borrowed" and "other" funds. Rate payers would have paid a total of $219 million dollars to NIPSCO (R. 1838-39), including the $190 million loss, and taxes

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The Public Service Commission of Indiana (hereinafter PSCI) found that the investment in Bailly N-1 was not property that was "used and useful" for the provision of utility service, and further found that it would "... never achieve that status." (Appendix, 70a). Nevertheless, the PSCI permitted NIPSCO to recover its investment, including AFUDC and associated tax benefits, as an "extraordinary cost of service loss." (Appendix 60a-61a). The PSCI considered that NIPSCO's expenditures for Bailly N-1 were prudently incurred in an effort to provide service in the future, and that NIPSCO should be permitted to recover them from ratepayers, notwithstanding that the ratepayers would receive absolutely no benefit. The PSCI also "allowed" NIPSCO a return on common equity of 17.50% in estimating an appropriate revenue requirement (Appendix, 57a), a level of authorized return higher than that allowed by any other state regulatory commission in the country at the time.

Appellees (Appellants below) successfully argued to the Court of Appeals[6] and the Supreme Court that the question before them was a pure question of law, involving the application of the plain language of Indiana's Public Service Commission Act.

This is a simple case, presenting a simple legal issue. The Public Service Commission Act requires as a mat-

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on the "equity" portion of AFUDC, which would be taxable income.

NIPSCO pocketed a cash tax refund of $15-20 million generated by the Bailly N-1 write-off, which it did not share with ratepayers. (R. 1850-51.)

(6) The decision of the Court of Appeals is reported at 472 N.E.2d 938.

> ter of law that cash rates be based on a charge for "service," IND. CODE § 8-1-2-4, as that term is defined in the Act, IND. CODE § 8-1-2-1. The Court of Appeals so held, and on this point was unanimous. (Compare 472 N.E.2d 938, 946 (Majority Opinion) with 472 N.E.2d 938, 953-54 (Dissent.) . . . .

Respondents' (Appellants below) Brief in Opposition to Transfer, p. 1.

NIPSCO attempted in the Indiana Court to recharacterize the case as one involving the details of utility regulation accounting and methodology, beyond the expertise of a reviewing court. The Indiana Supreme Court flatly rejected NIPSCO's invitation to abdicate its role of construing Indiana law.[7]

> The resolution of the issues in this case depends on the definition of service in I.C. § 8-1-2-1 and the construction of the other statutes in Title 8 which confer upon the PSCI its ratemaking authority and power. The construction of Indiana law is particularly the province of this Court.
>
> The Public Service Commission derives its power and authority from the statute, and unless a grant of power and authority can be found in the statute it must be concluded there is none.

Appendix 4a.

The Supreme Court plurality opinion, authored by Justice DeBruler and concurred in by Justices Pivarnik and Shepard is quite explicit in its holding.

> NIPSCO argues that the PSCI's characterization of the Bailly N-1 project as an extraordinary cost of service loss is correct. . . . The PSCI characterized the

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(7) Curiously, NIPSCO echoes that argument in this Court, citing an Indiana case ignored by all of the Indiana Supreme Court Justices, majority and dissenters alike. (J.S., p. 7).

Bailly N-1 project as a reasonable undertaking by NIPSCO to meet its duty to serve.

In essence, the PSCI order has unlawfully expanded the definition of service found in I.C. § 8-1-2-1. . . . The PSCI order places an additional charge on consumers other than that allowed in I.C. § 8-1-2-4. The additional charge is for reasonable and prudent attempts at service that fail and that provide no benefit to ratepayers.

Service commences with and includes "used and useful" property. Without "used and useful" property there cannot be any service. I.C. § 8-1-2-1, by defining service in such a manner as to render it dependent on "used and useful" property, is promoting a clear delineation and balance of investor and consumer responsiblities.

. . .

. . . NIPSCO embarked on a capital project to build a nuclear generating plant and, before it ever produced electricity, NIPSCO cancelled it. The definition of service in I.C. § 8-1-2-1 restricts the scope of includable property to that property which performs and furnishes, i.e., producing property or "used and useful" property. . . . Since Bailly N-1 never became "used and useful" property as I.C. § 8-1-2-1 contemplates, the PSCI's characterization of the cancelled Bailly N-1 project as an extraordinary cost of service loss was incorrect and the order allowing amortization was contrary to law. In dealing with and resolving this claim, we have been unable to conceive of a situation on our own in which the consumers could be required to act in aid and support of the utility as an insurer of the investor's risk, ...

Appendix, pages 9a-11a.

None of the four separate opinions of the Indiana Supreme Court Justices addressed any constitutional questions, either under Indiana law or federal law. See infra, footnote 8 and related text.

2. Summary of Argument

NIPSCO makes two related, but distinct arguments to the Court. One is based on the "Due Process Clause" of the Fourteenth Amendment, the other on the "Taking Clause." The "Taking Clause" was never presented to the Indiana Courts, and as indicated above, footnote 2, cannot be addressed on this record. It is the federal government, and not any organ of Indiana, that is most intimately connected with the decision to cancel Bailly N-1.

The "Due Process Clause" argument was also not "pressed or passed upon" in a manner sufficient to confer jurisdiction on this Court. However, it is also insubstantial on the merits.

As for the "Due Process" argument, NIPSCO invites the Court to return to the era of "substantive due process," where the details of state utility regulation and rate-making methodology become constitutionalized. NIPSCO is not so bold as to rely on any case decided by this Court in the last half century applying the Due Process Clause of the Fourteenth Amendment in reviewing a state utility matter, because there are none. (J.S. at pages 11 and 12, citing cases construing the Federal Power Act and the Natural Gas Act.)

This case presents nothing more than the Indiana Supreme Court's interpretation of state statutes governing the rates to be charged electricity customers of a public uility. The Appellant in this Court did not press any constitutional question in the courts below; no constitutional question was passed upon or presented for decision on the record in this case.

The issue before the Indiana Supreme Court, and before the Court of Appeals, was the nexus under Indiana statutes between cash rates to be charged customers and the provision of service. The Indiana courts declared that under the statutes of this state, utility customers can be charged only for "service." The term "service" is specifically defined under Indiana law. Ind. Code 8-1-2-1. A failed construction project, which never amounted to more than a hole in the ground, did not constitute "service" under that particular statutory definition. As a matter of Indiana law, therefore, ratepayers could not be made to pay in cash rates for the cost of that hole in the ground.

This simple proposition, that Hoosiers should not pay for something they did not get any "use" from, does not contravene any constitutional principle. The earliest "Substantive Due Process" cases recognized that property had to be "used and useful" before it was clothed with constitutional protection. Other state jurisdictions may disagree for their utility customers, but the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution does not canonize any particular utility ratemaking methodology. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944). In particular, the Constitution does not describe how close a state may require the connection between rates and service to be. In Indiana the Legislature has declared in plain language that the connection will be close. In asking this Court to disregard the "used and useful" principle, NIPSCO is insisting that this Court to surpass all of its predecessors in meddling in the details of state utility regulation. This Court should continue to reject the invitation to expand its jurisdiction.

NIPSCO pretends to discover an ". . . emerging conflict among federal and state courts" on this issue, that calls out for the intervention of this Court. J.S., at 12. However, NIPSCO is candid enough to admit that this discovery is the product of an active legal imagination, acknowledging, as it must, that its argument is based on the implications, rather than the holdings, of the Courts to which it adverts. Since this Court does not consider hypothetical, imaginary, or anticipated questions, this case should be dismissed.

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ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

A. Recent cases in this Court have held no substantial federal question.

This is not the first nuclear cancellation case to be presented to the Court. Two related cases from Ohio presenting the identical questions presented in this case control disposition of this appeal.

In *Office of Consumers Counsel v. PUC*, 455 U.S. 914 (1982), the Court dismissed an appeal on precisely this issue (ratemaking treatment of a cancelled construction project) for "want of a properly presented federal question." In that case, as here, the state court judgment had not specifically passed upon the constitutional issue urged in this Court.

As in the instant case, there was nothing in the decision of the Ohio Supreme Court to indicate that a federal question had been pressed or passed upon. 67 Ohio St. 2d 153, 423 N.E.2d 820 (1982). The Ohio decision treated Ohio statutory materials in a straightforward way, declaring certain rules of ratemaking methodology under Ohio law. There was quite simply nothing for this Court to pass upon. The rate order in that case was remanded by the Ohio Supreme Court to the Ohio Public Utilities Commission to effectuate the disallowance, as in the instant case.

In *Cleveland Electric Illuminating Co. v. PUC,* 464 U.S. 802 (1983) (*CEI II*), the case was back before this Court. This Court dismissed for lack of a substantial federal question an appeal from an order of the Ohio Supreme Court again authoritatively construing certain Ohio statutes, and disallowing the costs of the cancelled construction project. In *CEI II,* the Ohio Supreme Court had considered the asserted federal constitutional questions and specifically rejected them. 4 Ohio St. 3d 11, 447 N.E.2d 746, 748. Relying on a detailed discussion of the relevant constitutional principles in a contemporaneously decided case, *Dayton Power & Light v. Public Utilities Commission,* 4 Ohio St. 3d 91, 447 N.E.2d 733, the Ohio Supreme Coourt rejected the utilities' constitutional claims on two related grounds: (1) Under Ohio law, investors are ". . . *assured* a fair and reasonable return . . ." on property which is "used and useful" in providing service, ". . . while consumers may not be charged for utility investments and expenditures that are neither included in rate base nor properly categorized as costs. . . ." The Ohio Court considered there was no constitutional infirm-

ity in the Legislature's having struck this balance. (2) Denying amortization of the investment in a failed construction project did not result in a rate order confiscatory "in its entirety."

As NIPSCO acknowledges, this Court dismissed the appeal in *CEI II* after consideration on the merits, and after plenary consideration by the Courts below. These cases are the Court's last word on review of this type of state court decision, and should control. NIPSCO has cited no other decision of this Court intimating a contrary result.

B. Claim never "pressed or passed upon."

This Court's jurisdiction to hear this case is predicated, if at all, on 28 U.S.C. § 1257. Appellant's claim is that certain statutes of the State of Indiana, as authoritatively construed by the Indiana Supreme Court, contravene the Due Process Clause of the Fourteenth Amendment, and result in an unlawful "taking" of the Appellant's property.

These claims were never "pressed or passed upon" in the Courts below; this Court therefore lacks jurisdiction to consider them. *Illinois v. Gates,* 103 S. Ct. 2317, 2321-23 (1983); *Street v. New York,* 394 U.S. 576, 581-585 (1969).

As a general matter, this Court has no jurisdiction under 28 U.S.C. § 1257, ". . . unless a federal question was raised and decided in the state Court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'" *Cardinale v. Louisiana,* 394 U.S. 436, 438 (1969), quoting Story J. in *Crowell v. Randall,* 10 Pet. 368

(1836). The utter silence of the Indiana Supreme Court on the constitutional question should conclude this case, *State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U.S. 154 (1945), since the Indiana Court has clearly not had the opportunity to construe its statutes in light of the asserted constitutional claims. *Cardinale v. Louisiana, supra;* c.f., *District of Columbia Court of Appeals v. Feldman,* 103 S.Ct. 1303, 1315, fn. 16 (1983).

Nevertheless, NIPSCO may show that, notwithstanding the Indiana Court's silence, the federal constitutional question was presented ". . . in such a manner that it was necessarily decided by the [state court] when it [ruled]. . . ." *Street v. New York,* 394 U.S. 576, 581 The Appellant must affirmatively show both that the constitutional question was "properly presented" and that the state Court necessarily decided it, notwithstanding its silence. That is, the Appellant must affirmatively show both that the issue sought to be presented in this Court was both "pressed" and "passed upon."

Proper presentation requires a showing that there was a "real contest" at all levels of the state procedure. *Morrison v. Watson,* 154 U.S. 111 (1894.)

In *Illinois v. Gates,* Justice Rehnquist described the "real contest" element in detail. 103 S. Ct. 2317 at 2323-24. The issue cannot have been presented in a merely "routine" manner; there must be live "adversarial dispute" on the record, *ibid.,* so as to guarantee ". . . that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. . . ." *Id.* at 2325.

NIPSCO never addressed the statutory construction of the Court of Appeals or the Supreme Court requiring a close nexus between rates and service. It was therefore never in any position to argue a federal constitutional claim.[8] The fabrications and innuendoes in its Jurisdic-

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(8) Although NIPSCO claims in this Court that it presented the Indiana Supreme Court with its constitutional claims, (J.S. at 7) the record shows that at best it gave cursory nod in the general direction of the Constitution, and that only after it had lost in the Court of Appeals. There follows the entire presentation on rehearing in the Indiana Court of Appeals and on Petition to Transfer in the Indiana Supreme Court.

E. Taking Service or Property Without Just Compensation

The State of Indiana may not constitutionally require a utility to spend prudently large amounts of money for the convenience of the public, and at the same time prohibit the utility from recovering those expenditures through rates. Ind. Const. Art. I, § 21; U.S. Const. Amend. XIV, § 1; Wisconsin Public Service Corp. v. Public Service Commission (1982), 109 Wis. 2d 256, 325 N.W.2d 867, 871. Simply stated, it is unconstitutional for the state to demand someone's services or take his property without just compensation. Id.; Public Service Commission v. Indiana Bell Telephone Co. (1955), 235 Ind. 1, 130 N.E.2d 467. NIPSCO is under a statutory mandate "to furnish . . . service and facilities." Ind. Code 8-1-2-4. The Commission concluded in the instant case that NIPSCO prudently expended in excess of $190 million pursuant to this statutory requirement. (R. Vol. 4, pp. 573-591.) The majority opinion denies any recovery at any time of any amount of this money or accommodation service. (10) (Majority slip op. at 16-17.) Accordingly, the majority opinion results in the unconstitutional taking of property or service. As explained by the Wisconsin Supreme Court:

> 'Utilities have a statutory duty to engage in such expenditures. Sec. 196.-03(1), Stats., states: 'Every public utility is required to furnish reasonably adequate service and facilities.' It is arbitrary and capricious to authorize a utility to expand its facilities, spend large amounts of money prudently to accomplish that goal, and then force the utility to bear the entire risk of such expenditures.'

(Continued on following page)

tional Statement in this Court intimate the sort of factual record NIPSCO might have made, but did not.

> Although the state did not physically seize Bailly, or specifically order it cancelled, it left NIPSCO no choice but to abandon the project once it had become clear that the project could not economically be brought to completion; . . . (J.S. at 15; compare R. 1521, quoted above, page 2.) . . . .

The perfunctory way in which NIPSCO raised its "constitutional" issue discouraged even its supporters on the Court from addressing the Constitution. Neither the Order of the Indiana Supreme Court nor the multiple opinions expounding upon that Order consider or decide any constitutional question. This supports, rather than overcomes, the presumption that the question was not properly

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Wisconsin Public Service Corp. v. Public Service Commission, supra, 325 N.W.2d at 870-871.

> fn. 10 Money is obviously property. E.g., Department of Insurance v. Motors Insurance Corp. (1956), 236 Ind. 1, 12-13, 138 N.E.2d 157, 163; Black's Law Dictionary at 1096 (rev. 5th ed. 1979). Also, Ind. Const. Art. 1, § 21 prohibits confiscation by the state, of 'services.'

Brief of Respondents on Rehearing, pages 36-38.

This language was repeated, verbatim even to the typographical errors, in NIPSCO's Brief on the Merits in the Indiana Supreme Court. This was it.

Although a party is not confined in this Court to the same arguments made below. *Dewey v. DesMoines,* 173 U.S. 193, 197-98, it is apparent that no "Taking Clause" argument was made here, and that no cogent Due Process Clause argument was made.

Under Indiana law, an appellate Court may disregard an issue not supported by case authority and argument. App. Rule 8.3(A)(7). *Coleman v. State,* 241 Ind. 663 (1961); *N.Y., Cinn., & St. Louis Railway Co. v. Mercantile Bank Co.,* 130 Ind. App. 638 (1960). This rule may provide an independent state procedural ground for nonconsideration of the federal constitutional question. *Henry v. Mississippi,* 379 U.S. 111 (1965).

raised in the Court below. *Street v. New York,* supra; *Bailey v. Anderson,* 326 U.S. 203 (1946). Given the sharp disagreement among the Indiana Justices over the result, one would expect a constitutional question properly raised to have received appropriate attention from at least one of the four Justices who chose to write separately. However, not a single word.

NIPSCO's argument boils down to a contention analogous to that of a criminal who argues that because he was convicted, he was necessarily denied his constitutional rights. This does not sustain the federal appellant's burden of establishing jurisdiction. Compare, *Chambers v. Mississippi,* 410 U.S. 283, White concurring at 303, 304.

C. The standard of review of state utility rate orders.

NIPSCO's core "due process" contention is a bald assertion unsupported by case law or argument, that

> investor interests are impermissibly sacrificed where, as here, a state rate-setting system automatically ignores their investment.

J.S. at 11-12

However, it has been clear from the earliest cases that property must be "used and useful" in the utility enterprise before constitutional protections attach. *Smyth v. Ames,* 169 U.S. 466, 546-47 (1898). Even under the most abusive and intrusive notions of constitutional review of state utility ratemaking, it is not any investment that the federal courts protected. It is the investment in "productive" property. C.f., *McCardle v. Indianapolis Water Co.,* 272 U.S. 400 (1926); *DesMoines Gas Co. v. DesMoines,* 238 U.S. 153 (1915).

The constitutional bottom line was recently restated by the Court of Appeals for the District of Columbia Circuit:

> . . . Under the Constitution, a utility is entitled to rates, not per se excessive or extortionate, sufficient to yield a reasonable rate of return upon the value of the property used, at the time it is being used, to render the services. But it is not entitled to have included any property not used and useful for that purpose.' . . .

Jersey Central Power & Light Co. v. FERC, 730 F.2d 816, 819, quoting *Denver Union Stockyard Co. v. U.S.,* 304 U.S. 470, 475.

The "used and useful" limitation on the property that can be the basis for a rate is firmly embedded in the constitutional jurisprudence of review of state utility rate orders. It is probably for this reason that NIPSCO cannot cite the Court to any cases in support of its contention. The recent cases from Wisconsin and Missouri simply do not contain any clear constitutional holdings.

NIPSCO attempts to make much out of the "statutory duty to serve" but it is clear that the duty to serve under Indiana law does not compel a utility to make expenditures of any particular type (for example, to make capital investments in nuclear power versus purchasing power on the open market to resell for service to current customers.) Even if it did, it is not clear that the U.S. Constitution would be violated. See, *Atlantic Coast Line v. Goldsboro,* 232 U.S. 548, 558 (1914); *Norfolk Turnpike Company v. Virginia,* 225 U.S. 264 (1912).

The U.S. Constitution does not guarantee that a utility enterprise will result in net revenues, and it does not in-

sulate the utility from the vagaries of the general economy. *Federal Power Commission v. Natural Gas Pipeline Company,* 315 U.S. 575, 590. The assertion to the contrary by Circuit Judge Wilkey, quoted by NIPSCO at J.S. page 9, is a lone, and inaccurate voice.

Indiana law accords with the settled constitutional principles.

> Under traditional utilities concept, utility company shareholders and bondholders furnish the capital necessary for the operation of the business. The consumer pays a fair return on utility capital and in addition pays cost of operation including taxes, but it is well established that the company's investors must contribute the working capital.

Citizens Energy Coalition v. Indiana & Michigan Electric Company, 396 N.E.2d 441, 445 (Ind. App. 1979).

There is not a single authoritative holding that NIPSCO can bring to the Court to establish the existence of a constitutional question raised by the Indiana Court's reaffirmation of the "used and useful" principle. This Court should dismiss.

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CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

WILLIAM JULIAN II
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